NO. 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

LONNIE E. SMITH,
Petitioner

v.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL,
Respondents

MOTION FOR REHEARING OF GROVER SELLERS, ATTORNEY GENERAL OF TEXAS, AS AMICUS CURIAE

GROVER SELLERS
Attorney General of Texas
GEORGE W. BARCUS
Assistant Attorney General
R. DEAN MOORHEAD
Assistant Attorney General
Attorneys for Amicus Curiae

FIRM FOUNDATION—AUSTIN

NO. 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

LONNIE E. SMITH,

Petitioner

v.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL,

Respondents

MOTION FOR REHEARING OF GROVER SELLERS, ATTORNEY GENERAL OF TEXAS, AS AMICUS CURIAE

To the Honorable Supreme Court:

Now comes Grover Sellers, the Attorney General of the State of Texas, successor to Gerald C. Mann, as amicus curiae, and submits herewith his motion for the Court to set aside its opinion and judgment rendered herein on the 3rd day of April, 1944, and, upon further consideration, to affirm the judgments of the Courts below.

Because of the gravity of this Court's action in overruling its decision in *Grovey* v. *Townsend*, 295 U. S. 45, and because of the great importance of this question to the people of Texas and of the South, the Attorney General of Texas further prays that the Court set this cause for additional oral argument.

Respectfully submitted,

GROVER SELLERS
Attorney General of Texas

GEORGE W. BARCUS
Assistant Attorney General

R. DEAN MOORHEAD
Assistant Attorney General

Attorneys for Amicus Curiae

NO. 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

LONNIE E. SMITH,
Petitioner

v.

S. E. ALLWRIGHT, ELECTION JUDGE, ET AL,
Respondents

MOTION FOR REHEARING OF GROVER SELLERS, ATTORNEY GENERAL OF TEXAS, AS AMICUS CURIAE

To the Honorable Supreme Court:

Now comes Grover Sellers, Attorney General of the State of Texas, successor to Gerald C. Mann, as amicus curiae, and moves that this Court set aside its judgment in this cause, rendered on the 3rd day of April, 1944, and that upon further consideration the Court affirm the judgments of the Courts below in said cause. In support of this motion, the At-

torney General of Texas says that this Court erred in holding that the Fifteenth Amendment to the Constitution of the United States is violated when persons other than white persons are denied the privilege of voting in primary elections of the Democratic Party of Texas. In this respect, the Attorney General of Texas states:

I

In its opinion in this cause, this Court said:

> "Under our Constitution, the great privilege of choosing his rulers may not be denied a man by the State because of his color."

Despite the seeming unpopularity of its philosophy among certain strata of our government, the State of Texas continues to adhere to the fundamental American principle that elections are conducted, not for the purpose of choosing "rulers," but for the purpose of selecting "public servants." An understanding of this philosophy is perhaps basic to an understanding of the position taken by the Attorney General in this cause. Basic also is an understanding and full appreciation of the Bill of Rights with its guarantees of political thought and expression and its injunction that the powers not delegated to the United States nor prohibited to the States are reserved to the States and to their people. Fundamental to the position of the Attorney General is the principle that this should remain a government of laws rather than of men, and that the laws govern-

ing freedom of political thought and action should not be extended to those organizations with whose practices our "rulers" agree and denied to those with whose practices they disagree.

It is undisputed that the Democratic Party of Texas is a voluntary association, composed of persons with similar political tenets, and organized for the sole purpose of making these tenets effective in a peaceable fashion through the operation of the electoral processes. It is undisputed that under the laws of the State of Texas, the Democratic Party may prescribe the qualifications of its members, and that such prescription is not a legislative boon conferred by Article 3107, Vernon's Annotated Civil Statutes of Texas, but that it is an inherent privilege of a voluntary association, and, as such, is beyond control or interference by any governmental agency, *Bell* v. *Hill*, 123 Tex. 531, 74 S.W. (2d) 113. If the members so selected are to make effective their political beliefs, it seems obvious that they can do so only by selecting candidates who are truly representative of the Party membership and who fully subscribe to the thoughts and beliefs of the Party. In a democratic society, such selection can only be by a full and fair vote in a primary election. It would, of course, be possible for the Party to emulate those other voluntary associations to whom our government is now according the fullest protection, and to achieve its goals by violence, by political blackmail, or by an autocratic selection of its representatives. However, in lieu of these methods, the Democratic Party of Texas has chosen to place its views before

the people by means of candidates who are fairly and honestly elected by the Party membership. In appearing in this case, the Attorney General of Texas is arguing only that the Democratic Party possesses a constitutional right to pursue this course. If an association of Negroes, or of any race, creed or color, should choose to pursue a similar course, and if its privilege to do so should be in jeopardy, the Attorney General would be equally vigorous in its defense.

In its opinion, this Court makes much of the fact that the statutes of Texas regulate the manner in which primary elections are conducted. It is true that the statutes so operate, but it is equally true that under the Constitution and decisions in Texas, all primary elections are conducted by party officials at party expense, and that the State can say not one word with respect to the persons who are entitled to participate in such elections. In the case of *Koy* v. *Schneider*, 110 Tex. 369, 221 S. W. 880, the Supreme Court of Texas long ago held that the suffrage provisions of the Texas Constitution and statutes are applicable only to "governmental elections" and that primary elections can in no way be considered "governmental elections." Insofar as the suffrage provisions of the Texas statutes purport to extend to primary elections, they are, under this decision, null and void. The Fifteenth Amendment to the Federal Constitution stands as a guarantee against the denial or abridgment of the right to vote only when such denial or abridgement is the result of *State*

action; it is no way guarantees the right to vote in "non-governmental elections" when the denial of such right is the result of action on the part of a private association.

The statutes by which the State of Texas regulates the manner of conducting primary elections are but those which would be passed by any enlightened state to insure the purity of the ballot. Insofar as they are effective, they relate exclusively to the *method* of voting and not to the *qualifications of voters.* Plainly these statutes are primarily designed not for the protection of the Democratic Party, but for the protection of the entire State, so that the whole of the citizenry shall not suffer from corruption on the part of a few. If it be the thought of this Court that the presence of such statutes constitutes the Democratic Party a state agency and thus brings it within the scope of the Fifteenth Amendment, the defects in such belief are apparent. Texas and other states impose a host of regulations upon the method of conducting other "non-governmental elections" such as those of banks, of insurance companies, and of other private associations. Again, the purpose of these regulations is to protect the whole of the State from improper action on the part of a few, yet it could scarcely be contended that the existence of such regulations metamorphoses these organizations into state agencies and places their elections within the Fifteenth Amendment Strange indeed is a doctrine which transforms a private association into a state agency merely because the police powers of the

State are applicable to such association.

From the opinion of the Court one gleans occasional hints that perhaps the factor which brings primary elections within the scope of the Fifteenth Amendment is not the presence of statutes regulating these elections, but rather that it is the fact that the names of the Party nominees are placed on the official ballot in the general election. Apparently it is thought that since this is so, the denial of the right to vote in a primary election is in some way a denial of the right to a free expression of opinion in the general election, and hence that the franchise is in effect denied by the action of the State. A mere statement of this chain of reasoning should suffice to demonstrate its infirmities, and to raise doubts as to whether it is the result of that syllogistic reasoning which begins with a premise and terminates with a conclusion, or whether the reverse is true. Under the laws of Texas, the denial of a vote in a Democratic primary withholds from no man the privilege of making an unfettered choice of candidates in the general election. The statutes of Texas make full provision for placing on the ballot in the general election the names of independent candidates, of non-partisan candidates, of candidates whose parties do not conduct a primary election, and of candidates whose parties do not maintain a state organization. In addition, the official ballot must contain a blank space to permit the voter to cast his ballot for any person whose name is not printed thereon. See Chapter 13 of Title 50 of the Revised Civil Statutes of Texas, and Article 2978. Thus,

those who for any reason are unable to vote in a Democratic primary are free to enter the names of their candidates in the general election and to cast their ballots in favor of such candidates. Moreover, this unfettered choice extends even to those who have voted in a primary election, since it is settled that the pledge of party loyalty contained on the ballots in primary elections is in no way legally enforceable. *Love* v. *Wilcox*, 119 Tex. 256. Regardless of how the candidates of the Democratic Party are selected, such selection denies to no man the privilege of placing the name of the candidate of his choice upon the ballot in the general election and of voting for such candidate.

Other portions of the opinion of this Court seem to say that while the Party is free to choose its membership, and thus may limit such membership to white persons, the Party is not likewise free to limit the persons who may participate in its elections. In essence, this is to say that a political party cannot confine its own elections to its own members, but that it must permit non-members to vote in such elections. Such a holding makes a mockery of the primary election system. If primaries serve any purpose, they serve the purpose of selecting candidates whose views and beliefs are in accord with those of the organization whom they represent. Yet under the decision of this Court, the admission of outsiders to a Party election might well result in the selection of a so-called "Democratic candidate" who would in no way be representative of the Party membership. Other states employ "branding iron

primaries" and registration statutes for the dual purposes of insuring that non-members will not interfere with the results of Party elections and of guaranteeing the selection of representative candidates. The validity of such practices is firmly established, yet this Court is in the position of denying the Democratic Party of Texas the privilege of accomplishing the same ends by another means.

Political parties exist only for the purposes of formulating those policies which they deem most beneficial to the state or nation and of securing the adoption of these policies by a majority of the people. In most instances, this adoption can be secured only by the election to public office of the candidates of such parties. In upholding the right of a party to limit its membership while denying it the right to select candidates who are chosen solely by such membership, this Court pays lip service to the inherent rights of existence of political parties while denying such parties the one practical means of making this existence purposeful If freedom of political thought and expression is guaranteed by the Constitution, it would seem to follow that the means of making such thought effective in a democratic society are equally guaranteed.

II

It seems futile to argue further the applicability of this Court's prior decisions to the instant situation. That the case of *United States* v. *Classic*, 313 U. S. 299, is in no way relevant has been demon-

strated both in the briefs and argument of counsel and in Mr. Justice Roberts' apt and eloquent dissent. The other prior decisions of this Court, embodying as they do a logic consistent with the philosophy of those who founded the Court and who have occupied its benches for the preceding century and a half, have met the fate of being overruled rather than of being either applied or distinguished.

Certainty has heretofore been deemed the touchstone of the law, and that certainty has been obtained by a conscientious judicial application of the doctrine of *stare decisis* in order that once the law on a given subject has been enunciated, law-abiding men might thereby govern their conduct and rest assured that their actions are proper. While the doctrine of *stare decisis* has never demanded a blind adherence to past decisions, it has at least commanded a respect for the views of those who rendered such decisions and has influenced a general judicial recognition that such decisions should stand unchanged unless they are flagrantly erroneous or unless altered conditions have made them inapplicable to current situations. Nine years ago in the case of *Grovey* v. *Townsend*, 295 U. S. 45, this Court decided the question here involved in a manner directly contrary to its present decision. One can scarcely think that conditions are now so altered as to demand a reversal of the prior decision Moreover, since nine justices in that case unanimously reached a conclusion contrary to that reached by eight justices in the instant case, one cannot say that the prior decision was flagrantly erroneous. At most, one can merely

say that the question of the correctness of the decision is one upon which reasonable men might well differ, and have differed. The decision of this Court has made criminals of thousands of Texas election officials who have in fact done nothing except to follow this Court's opinion in *Grovey* v. *Townsend*. By assuming that the law possesses a modicum of sertainty and by following the law as it was enunciated by this Court in 1935, these officials now learn that they are liable for damages and that they have violated those penal statutes which guarantee a ballot to all qualified persons. Under the decision of this Court, the present situation of these officials is lamentable, but perhaps even more distressing is their future. What importance shall the election officials of Texas attach to the instant decision? Is it, as Mr. Justice Roberts predicts, comparable to a restricted railroad ticket, good for this day and train only? If election officials act upon the basis of the instant decision, will succeeding decisions of this same term of Court, or of future terms, once more transform them into malefactors? The Greek philosopher Heracleitus is credited with saying that all is change, all is flux. The people of the State of Texas are interested in seeing if this dootrine is now to be elevated over the doctrine of *stare decisis*.

III

WHEREFORE, premises considered, the Attorney General of Texas, as amicus curiae, prays that this motion be granted, that the judgment of this Court

heretofore rendered on the 3rd day of April, 1944, be set aside, and that upon further consideration the judgments of the lower Courts be in all things affirmed.

Respectfully submitted,

GROVER SELLERS
Attorney General of Texas

GEORGE W. BARCUS
Assistant Attorney General

R. DEAN MOORHEAD
Assistant Attorney General

Attorneys for Amicus Curiae

P. O Address:
Capitol Station
Austin, Texas